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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 37

TEXTILE WORKERS UNION OF AMERICA, PETITIONER

v.

DARLINGTON MANUFACTURING COMPANY, ET AL.

No. 41

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DARLINGTON MANUFACTURING COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

I

In our opening brief, we pointed out that the court below had accepted *arguendo* the Board's findings that Darlington and Deering Milliken constituted a single employer for purposes of the Act, and that the Darlington plant had been shut down in order to

avoid collective bargaining at that plant and to retaliate against the employees for their selection of a union representative (NLRB Br. 26–29). In their briefs, Darlington and Deering Milliken have undertaken to challenge these findings, contending (1) that a single-employer relationship may not properly be sustained unless the ownership of the various companies sought to be combined is virtually identical; and (2) that Darlington went out of business for economic rather than discriminatory reasons (Darlington Br. 60–65, 43–51; Deering Milliken Br. 28–36). There is no merit to either of these contentions.

1. Although many of the cases where a single-employer relationship has been found involve situations where there was virtual identity of ownership among the various companies, the governing principle does not turn on that factor. The decisive inquiry is whether the relationship between the companies is such that they function, to a substantial degree, as a single enterprise. Such unity may be evidenced by a variety of factors, such as common ownership, common control over labor relations, integration of operations, or interchange of employees.[1] The question of what combination of these factors or others is sufficient to establish a single-employer relationship depends upon the circumstances of each case.

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[1] See *National Labor Relations Board* v. *Deena Artware, Inc.*, 361 U.S. 398, 402–404; *National Labor Relations Board* v. *Royal Oak Tool & Machine Co.*, 320 F. 2d 77, 80–81 (C.A. 6); *National Labor Relations Board* v. *A. K. Allen Co.*, 252 F. 2d 37, 38–40 (C.A. 2); *Sakrete of Northern California* v. *National Relations Board*, 332 F. 2d 902, 904–908 (C.A. 9), pending on petition for a writ of certiorari, No. 556, this Term.

Thus, while a single-employer finding is often justified where there is complete common ownership, this factor may be outweighed by other circumstances which evidence that the companies are in fact operated as separate entities.[2] Conversely, where these other circumstances show that the companies are operated as a single enterprise, a single-employer finding may be warranted notwithstanding the lack of a virtual identity in ownership interest.[3] Nor is a different conclusion required by the consideration that, if a single-employer relation is found where the ownership of the two companies is not identical, this "would work a grave injustice on the minority owners of the corporation held secondarily responsible, who are thus penalized for the acts of others over

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[2] See *Miami Newspaper Pressmen's Local No. 46* v. *National Labor Relations Board*, 322 F. 2d 405, 409 (C.A.D.C.) (independent determination of labor policies and substantial geographic separation); *J. G. Roy & Sons Co.* v. *National Labor Relations Board*, 251 F. 2d 771 (C.A. 1) (separate formulation of labor policies and no employee interchange).

[3] See, *e.g.*, *National Labor Relations Board* v. *Calcasieu Paper Co.*, 203 F. 2d 12, 13 (C.A. 5), enforcing 99 NLRB 794, 795–797, 801–802; *National Labor Relations Board* v. *Arnolt Motor Co.*, 173 F. 2d 597 (C.A. 7), enforcing 68 NLRB 868, 872–873; *National Labor Relations Board* v. *McCatron*, 216 F. 2d 212, 213–214 (C.A. 9), certiorari denied, 348 U.S. 943; *National Labor Relations Board* v. *A. K. Allen Co.*, 252 F. 2d 37 (C.A. 2).

Darlington's attempt to distinguish these cases (Br. 63) is unavailing. Since the same statutory definition is involved—*i.e.*, the definition of "employer" in Section 2(2)—the test of employer status is the same whether the issue arises in connection with a representation proceeding, the determination of the Board's statutory jurisdiction, or, as here, the determination of responsibility for unfair labor practices.

which they had no control and which they were powerless to prevent" (Darlington Br. 64). The minority stockholders, by electing to participate in a company which has so entwined itself with the affairs of another as to make the two companies in reality one economic enterprise, are no longer entitled to hide behind the corporate veil and are properly chargeable for the acts of the combined enterprise.[4] See Berle, *The Theory of Enterprise Entity*, 47 Col. L. Rev. 343.

The Board was fully warranted in concluding that there were ample ties among Deering Milliken, Darlington, and the other corporations in the Milliken complex to make them a single employer for purposes of the Act. As shown in our opening brief (pp. 13–21), Darlington was one of 17 corporations, operating 27 textile mills, all commonly controlled by the Milliken family. The Milliken family owned a majority of the stock in Deering Milliken and Company and in Cotwool Manufacturing Company (one of the 17 corporations), and, through direct stock ownership and the stock held by these two companies, the family owned more than 66 percent of Darlington's stock. Deering Milliken and Company acted as exclusive sales agent and factor for all 27 textile mills.

Roger Milliken was president of Deering Milliken and Company, and of most of the mill corporations, including Darlington. A majority of the directors of all but one of these corporations were members of the Milliken family. Such pervasive interlocking of

[4] Ordinarily, of course, the stockholders are not individually liable.

stock ownership, officers and directors is cogent evidence of a single-employer relation.[5]

Moreover, as the dissenting judges below pointed out (VI R. 1905):

> The record * * * reveals that the Deering Milliken complex was a thoroughly integrated, monolithic enterprise. The participating mills were able to call upon various service areas of the enterprise to effect optimum employment of men, material, and machinery. Sales were made and factored through a common agency. Management personnel was jointly recruited and transfers freely made from one corporation to another. Moreover, descriptive literature and advertising published by Deering Milliken on behalf of the manufacturing corporations repeatedly emphasized the generic brand name of Milliken rather than individual corporate brand names.

This high degree of integration of operations, which resulted in the various corporations not only functioning as a single economic enterprise but in holding themselves out to the public as one entity, "Milliken,"

[5] "Interlocking directorates and family ties make the four [mills] equal one for our purposes." *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226, 227, n. 2. See also, *National Labor Relations Board* v. *Somerset Classics, Inc.*, 193 F. 2d 613, 615 (C.A. 2), certiorari denied, *sub nom. Modern Manufacturing Co., Inc.* v. *National Labor Relations Board*, 344 U.S. 816; *National Labor Relations Board* v. *Lund*, 103 F. 2d 815, 818–819 (C.A. 8); *National Labor Relations Board* v. *Jones Sausage Co.*, 257 F. 2d 878, 879–880 (C.A. 4); *National Labor Relations Board* v. *Concrete Haulers, Inc.*, 212 F. 2d 477, 478–479 (C.A. 5); *National Labor Relations Board* v. *McCatron*, 216 F. 2d 212, 213–214 (C.A. 9), certiorari denied, 348 U.S. 943.

also furnishes substantial support for a single-employer finding.[6]

Finally, the record shows that one person, Roger Milliken, did in fact exercise dominion and control over all phases of the business and labor relations at each mill and over each corporate entity in the entire complex.[7] In addition to approving capital expenditures and passing on other financial matters, he received reports from each of the mills as to progress in reducing the number of jobs, the pay raises given, hours worked and job assignments, and employee productivity. His approval was sought before vari-

[6] See *National Labor Relations Board* v. *Gibraltar Industries, Inc.*, 307 F. 2d 428, 431 (C.A. 4), certiorari denied, 372 U.S. 911; *National Labor Relations Board* v. *Jones Sausage Co.*, 257 F. 2d 878, 879–880 (C.A. 4); *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 238 (C.A. 8), certiorari denied, 334 U.S. 845; *National Labor Relations Board* v. *Somerset Classics, Inc.*, 193 F. 2d 613, 615 (C.A. 2), certiorari denied, *sub nom. Modern Manufacturing Co., Inc.* v. *National Labor Relations Board*, 344 U.S. 816; *National Labor Relations Board* v. *Concrete Haulers, Inc.*, 212 F. 2d 477, 478–479 (C.A. 5).

[7] The vesting of ultimate power over labor relations and other operations in a single individual is likewise persuasive evidence of a single-employer relation. See *National Labor Relations Board* v. *Gibraltar Industries, Inc.*, 307 F. 2d 428, 431 (C.A. 4), certiorari denied, 372 U.S. 911; *National Labor Relations Board* v. *Williams*, 195 F. 2d 669, 671 (C.A. 4), certiorari denied, 344 U.S. 834; *A. M. Andrews Company of Oregon* v. *National Labor Relations Board*, 236 F. 2d 44, 45 (C.A. 9); *National Labor Relations Board* v. *Lund*, 103 F. 2d 815, 818–819 (C.A. 8); *National Labor Relations Board v. National Shoes, Inc.*, 208 F. 2d 688, 691 (C.A. 2); *National Labor Relations Board* v. *Somerset Classics, Inc.*, 193 F. 2d 613, 615 (C.A. 2), certiorari denied, *sub nom. Modern Manufacturing Co., Inc.* v. *National Labor Relations Board*, 344 U.S. 816; *Sakrete of Northern California* v. *National Labor Relations Board*, 332 F. 2d 902, 906–907 (C.A. 9), pending on petition for a writ of certiorari, No. 556, this Term.

ous personnel actions were taken, before vacation plans were announced, and before changes in the employees' group insurance plan were made. He sent numerous memoranda to the mills—addressed to all of them and replete with references to "our" mills—containing suggestions with respect to the hiring of personnel, improving production, reducing jobs, and many other matters. And, as shown (NLRB Br. 3–13), Roger Milliken initiated and executed the decision to close the Darlington plant because of the employees' organizational activities, and he thereafter distributed to management personnel in several mills of the family complex a magazine article emphasizing that the closing of the Darlington plant was consistent with the Milliken family's practice of closing plants that had become unionized.

2. The second contention—that the Darlington plant was shut down for economic reasons and not as an act of reprisal for the employees' having selected the Union—stands on no better footing. The Trial Examiner, whose finding was adopted by the Board (R. 7–9, 65–66), found to the contrary. The dissenting judges below observed that the fact that "the plant closure was the direct result of the organizational activities of the employees is too well documented by the record to require extended discussion" (VI R. 1909); the judges comprising the majority of the court below accepted this finding *arguendo* (VI R. 1898–1899).

The evidence fully supports the finding of the Board and the Trial Examiner that it was not the

economic situation of the plant or the anticipated costs of an organized plant, but Roger Milliken's general hostility to unions and his desire to punish the employees for having selected a representative which prompted the shutdown of the Darlington plant. This evidence was summarized in the dissenting opining below (VI R. 1909):

> Roger Milliken himself gave that reason to his stockholders for his decision to close the mill. On approximately thirty separate occasions, supervisory personnel threatened the employees with closure in case the union won, and attributed their prophesies to Roger Milliken's well publicized hostility to unions. Milliken himself circulated to all of his mills a trade magazine article pointing out that his attitude was so well known that liquidation was inevitable from the minute the election result was announced. Darlington's belated efforts to stress the economic factors are belied by the prior history of the mill. In the nine months prior to the election, management had spent $400,000.00 in a modernization program which included not only new machinery but additions to plant structure * * *.

Moreover, Roger Milliken decided to shut down the day after the Union's election victory, and well before it had made any bargaining demands. And even when he was informed that 83 percent of the employees had subsequently repudiated the Union, he refused to reconsider his decision, replying that he would not operate so long as the work force included

"17 percent of hard core labor people" (R. 5; 268).[8]

Nor is there any basis in the record for assuming, as Darlington does (Br. 46–51), that Milliken's decision was based upon a particularized evaluation of the impact which unionization would have on the plant's financial condition. The record shows that his primary motive was simply to defeat employee organization and that any economic judgment rested on a bare generalized impression that the Union would make continued operations less profitable.[9] If the purposes of the Act are to be carried out, such an imprecise judgment cannot be regarded as sufficient to constitute an economic justification for the sort of action taken here. For if this general notion is sufficient, all prohibited anti-union conduct could be justified on the same "economic" ground.

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[8] Darlington suggests (Br. 45, n. 23) that this statement shows that Roger Milliken was unwilling to keep the plant open even in the absence of any Union. It argues that, if "only 17% of the workers adhered to the Union, the Union stood ultimately to lose its certification and the company would be under no obligation to deal with it." The fallacy in this argument is that a certification is presumptively valid for at least one year even though the union loses its majority. Furthermore, a loss of majority status caused by unfair labor practices does not relieve an employer of his bargaining obligation. See *Brooks* v. *National Labor Relations Board*, 348 U.S. 96; *Franks Bros.* v. *National Labor Relations Board*, 321 U.S. 702.

[9] The cases relied on by Darlington (Br. 46–47) do not advance its position. Most of the cases did not, as here, contain any independent evidence of anti-union motivation. Moreover,

II

1. Darlington and Deering Milliken contend that, even if the Board's single-employer finding be accepted, it is still necessary to determine whether the Act permits an employer to go completely out of business even though his motive is to avoid collective bargaining and to penalize his employees for selecting a union representative. This argument rests on the assumption that there is no meaningful distinction between permanently closing down part and shutting down all of an operation. For, the argument runs, just as the employer pays the price of foregoing profits from an enterprise if he goes completely out of business, so does he lose profits from a single operation if he permanently closes one of his plants and does not transfer its work elsewhere (Darlington Br. 22–24, 52–59; Deering Milliken Br. 36–43).

In our opening brief (pp. 39–42), we have shown that this argument is unsound for two reasons. First, nothing in the Act or its administration suggests that an employer may engage in anti-union discrimination, coercion, and restraint if he is willing to pay a price for it. Second, even if such conduct were permitted whenever a *quid pro quo* could be found, it would not be permissible here. For Deering Milliken "paid no price," but used the closing of the Darlington plant to ward off unionization by the employees in

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none of the cases involves a situation where the employer terminated operations on a naked assumption (cf. Darlington Br. 49–50) that the advent of the union made continued operations uneconomical. Cf. the cases cited in n. 30, p. 34 of the Board's Main Brief.

its other plants. Hence, whatever may be the result in other situations, this case may properly be viewed as legally indistinguishable from cases in which an employer contracts out or discontinues part of an operation for anti-union reasons (NLRB Br. 33–34).

2. The legislative history cited by Darlington (Br. 30–32) does not require a contrary conclusion. There is no indication that the statements that nothing in the Act prevent an employer from closing down his factory were intended to apply to a situation where, as here, the shutdown was discriminatorily motivated. On the contrary, the context in which the statements were made reveal that they have reference only to situations in which the shutdown is motivated by economic or other reasons not proscribed by the Act. Thus, while Senator Walsh stated, "No one can compel an employer to hire others in addition to those he sees fit to hire," it is clear that this only has reference to a refusal to hire based on non-discriminatory grounds. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, held that a refusal to hire because of anti-union considerations is an unfair labor practice.[10]

[10] It is also clear that a temporary shutdown is illegal if motivated by anti-union considerations (NLRB Br. 38, n. 35, 36). In quoting from *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 132, Darlington (Br. 26, n. 10) omits one important qualification. The entire passage reads: "The act does not compel petitioner to employ anyone; * * * The act permits a discharge for any reason *other than union activity or agitation for collective bargaining.* * * * The petitioner is at liberty * * * to exercise its undoubted right to sever his relationship for any cause that seems to it proper *save only as a punishment for, or discouragement of, such activities as the act declares permissible.*" [Emphasis added.]

3. Contrary to Darlington's assertion (Br. 67–69), the fastening of back-pay liability upon it for the period after it ceased operations [11] does not exceed the power of Congress to regulate commerce. If Darlington and Deering Milliken are viewed as one employer, a view which we have shown is amply warranted on this record, it is clear that the employing enterprise still continues in commerce notwithstanding the closing of the Darlington plant. And since the failure to remedy the unfair labor practices involved in that closing would have a substantial impact on the remainder of the enterprise, this is a sufficient effect on commerce to justify the continued application of Congress' regulatory power. Moreover, even if Darlington alone were viewed as the employer, it does not follow that it would remove itself from the reach of the commerce power simply by going out of business. "The mere fact that an employer may cease to do business certainly does not end the public interest involved in seeing that a back-pay award under the Act

[11] The Board's order requires Darlington, together with Deering Milliken, to reimburse the wrongfully discharged Darlington employees for wages lost as a result of the discrimination from the time the decision to liquidate the plant was made until the employees are able to obtain substantially equivalent employment, or are placed on a preferential hiring list at other Deering Milliken plants (R. 21–23, 27–28).

is satisfied:" *National Labor Relations Board* v. *Killoren*, 122 F. 2d 609, 612 (C.A. 8). See also *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25. Cf. *National Labor Relations Board* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226; *Wiley* v. *Livingston*, 376 U.S. 543, 549.

Nor is there merit to the contention that to subject the Darlington plant's assets to back-pay liability deprives the stockholders of that plant of property without due process of law (Darlington Br. 69–73). As the Board pointed out (R. 11):

> The South Carolina Code [Sec. 12–601, 12–644] considered in its entirety, provides, * * * that, in the event of a corporate dissolution, the corporate entity survives for the very purpose of continuing the legal obligations that the corporation incurred before the dissolution or in the course of dissolution.

Thus, under a State law whose validity it does not challenge, Darlington's assets remain subject to claims by an unsecured creditor such as the Board. *National Labor Relations Board* v. *Deena Artware Inc.*, 361 U.S. 398. Only after such creditors are satisfied do the stockholders have a right to receive the assets which remain. See 16A Fletcher, *Cyclopedia of Corporations* (1962 ed.) Secs. 8148, 8161, 8174, 8186, 8217–8220; Annotation—*Dissolution of Corporation*, 97 A.L.R. 477. Any delay in settling the Board's status as a creditor is the consequence of the complexity of the underlying issues, which have occasioned review by this

Court. Such an opportunity for judicial review before liability finally attaches is the very antithesis of a deprivation of property without due process. Moreover, Darlington can hardly complain of the delay in distributing the remaining assets to the shareholders, since it agreed to discontinue further distributions until this case was finally resolved.[12] Finally, it should be noted that Darlington has never been powerless to prevent its back-pay liability from mounting. Under the terms of the Board's order, Deering Milliken, the controlling owner of Darlington, could limit this liability at any time by placing the employees on a preferential hiring list.

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[12] A stipulation to this effect was entered in a proceeding for interim injunctive relief brought under Section 10(j) of the Act (29 U.S.C. 160(j)) by the Board's Regional Director. *Johnston* v. *Darlington Manufacturing Corp.*, Civil No. 126–258 (S.D. N.Y.), November 27, 1957. The Regional Director's petition asserted, on information and belief, that, before the proceeding was instituted, Darlington had distributed $3,480,000, leaving $776,000 to cover taxes, expenses of liquidation, and back pay.

For the reasons stated here and in our main brief, the judgments denying enforcement of the Board's order should be reversed, and the case remanded to the court of appeals for further proceedings.

Respectfully submitted.

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